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IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Petitioner,

v.

ASBESTOSIS CLAIMANTS REPRESENTED BY THE MARITIME ASBESTOSIS LEGAL CLINIC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ALAN KELLMAN
THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.
645 Griswold, Suite 1570
Detroit, Michigan 48226-4116

SANFORD F. YOUNG
Counsel of Record
LAW OFFICES OF SANFORD F. YOUNG, P.C.
225 Broadway
New York, New York 10007
(212) 227-9755

Attorneys for Respondents Asbestosis Claimants

221483

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Does Petitioner present compelling reasons to grant the Petition where the subject matter of the Second Circuit's Opinion, *i.e.*, the enforcement of the express payment and set-off provisions contained in the Second Amended Joint Plan of Reorganization of the Prudential Lines, Inc., as Modified, dated August 17, 1990 and duly confirmed by the Bankruptcy Court on October 4, 1990 [the "Plan"]:

a. is *sui generis* and has no significance beyond the parties;

b. does not conflict with any decision of this Court or any United States Court of Appeals and does not implicate any important federal question;

c. involves underlying issues which are controlled by state law; and

d. enforces Plan provisions which are binding on Petitioner since it did not appeal from the confirmation thereof?

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INTRODUCTION

This matter arises from a contested proceeding originating in the Bankruptcy Court for the Southern District of New York in December 1990. The Petition centers on the interpretation and enforcement of one sub-section of the Debtor, Prudential Lines, Inc. ["PLI"]'s 1990 Bankruptcy Plan. Those provisions were specifically included in the Plan to enable the Trustee to pay the outstanding claims of over 10,000 victims of asbestos poisoning and other designated Class 5C claimants, for which the Trustee can thereby seek reimbursement under various marine insurance policies written by Petitioner, American Steamship Owners Mutual Protection and Indemnity Association, Inc. [oftentimes referred to as "the Club"]. Petitioner is a self-insurance group set up by the industry, to which the Debtor was a member for over 40 years. The Asbestosis Claimants were merchant marine-employees of the Debtor's former shipping line, Prudential Lines, Inc.

The Plan's arrangement is patterned on a plan approved in *Liman v. American Steamship Owners Mut. Protection and Indem. Assn*, 299 F.Supp. 106 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (1969) (*per curiam*). The Plan thus created a "Liman Fund" of $300,000 to be used by the PLI Disbursements Trust to pay each Class 5C Claimant for his or her allowed claims.[1] After paying each claim, the Trustee obtains reimbursement from Petitioner under the applicable insurance policy.

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[1] So as to preserve the balance of the fund, the Trustee has agreed to waive his future fees.

As the Liman Fund is replenished, the Trustee is enabled to pay more allowed claims, which are likewise reimbursed by the Club, which process continues until all claims are paid "on a sustaining basis." See, Plan §4.05.07(a)(i) (App.71a-74a).[2]

To accommodate Petitioner's claim that it is entitled to offsets for unpaid premiums for four out of 41 policy years of coverage, the Plan provides that "each holder of an affected Allowed Insured Claim shall share [offsets] ratably (with all other holders of affected Allowed Insured Claims. . .)." Plan §4.05.07(a)(iv) (App.77a-78a; paren. in original). The amount of each claimant's pro rata share of the Club's offsets, as well as the policy deductible attributable to each claimant becomes that claimant's general unsecured claim against the bankrupt estate (Plan §4.05.07(a)(i)(3rd para.; App.73a). *See also*, *Prudential IV* at App.286a-287a & 296a.

Petitioner's 20-plus year battle against meeting its obligations under the insurance policies at issue (which included two earlier appeals to the Second Circuit; *see*, App.242a, and 59 F.3d 327 (1995)) culminated in the 2008 Opinion holding that the Plan provisions should be enforced as written. After being denied a rehearing by the panel and *en banc* rehearing, Petitioner's last gasp is the instant Petition which tries desperately to fabricate a federal question. There is nothing about the Second Circuit Opinion that suggests any conflict with any decision of this Court or any Circuit Court, nor that

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[2] References preceded by "App." are to pages of Petitioner's Appendix; "Pet." to pages of the Petition itself; and "Cir.Ct-J.A." to the Joint Appendix submitted to the Second Circuit.

implicates any federal question, whether compelling, significant or otherwise. In fact, the heart of all issues surrounding Petitioner's insurance obligations, as articulated in all of the prior decisions in this matter, are controlled by state law. Among those is the Second Circuit Opinion which, drawing upon the prior unappealed holdings that are the *law of the case*, does little more than enforce the Plan provisions precisely as they have been intended and written.

The bottom line is that the sole issue raised by Petitioner is *sui generis* to this case, and merely involves the construction and interpretation of several words contained in the singular Bankruptcy Plan, which when it was confirmed, became binding on Petitioner as if it were a court order or contract.

On every level — whether based on contract construction, state law or Petitioner's new argument under 11 U.S.C. §553 – there is no merit to its argument. As recognized in the Second Circuit Opinion, the Bankruptcy Court in a final, binding 1992 decision held that Petitioner was liable under 41-years of separate annual policies, for which 37 were fully paid for. Accordingly, the Second Circuit Opinion reasoned that since the various claims at issue could be made under any of the fully-paid policies – wherein the prior 1992 Bankruptcy Court decision (*Prudential I*; App.124a) and 1998 Second Circuit Opinion (*Prudential IV*; App.242a) also found that since asbestos exposure covers many years, coverage can be obtained under any policy year therein – it would "not [ ] interpret it [the ability to ratably offset] as an absolution, parlaying the

Insurer's immunity as to four unpaid policy years into an immunity also covering thirty-seven fully paid years" (App.17a).

STATEMENT OF THE CASE

The Parties

Prudential Lines, Inc. [the Bankrupt Debtor]

PLI is the successor company to what was once among the oldest and largest United States flag fleets, the Grace Lines, formed in 1860. PLI owned and operated a commercial shipping fleet of over 700 ships and employed tens of thousands of seamen. In November 1986, an involuntary bankruptcy petition was filed.

Petitioner – American Steamship Owners Mutual Protection and Indemnity Association, Inc.

Petitioner-Club is a mutual indemnity insurance association of ship owners organized to provide its members with marine protection and indemnity coverage. On an annual basis, members pay premiums and can be assessed additional amounts to cover the cost of claims. Petitioner obtains reinsurance for approximately 90% of its policies. Petitioner, which was formed in 1917 and still active, is the only such organization in the United States and one of 13 such associations worldwide. Together, they insure approximately 90% of the world's shipping. PLI was an insured member of Petitioner from 1940 to 1970 and from

1975 to 1986. During those years, PLI paid Petitioner millions of dollars in premiums and assessments in exchange for annual insurance contracts.

Respondent – Asbestosis Claimants

Over the decades preceding PLI's bankruptcy, thousands of its merchant marine employees were exposed to asbestos aboard its ships. Among the claimants are 1328 that have been diagnosed with mesothelioma and lung and other malignant cancers caused by asbestosis, and over 1300 wrongful death claims (which number increases every several days).[3] All told, there are approximately 10,000 former PLI employees who have been suffering or died from asbestos-related diseases whose claims are being adjudicated in a multi-district litigation before the Eastern District of Pennsylvania. *In re Asbestos Products Litigation / In Re Ohio Asbestos Litigation*, Docket No. 2 MDL 875. In the MDL court, the proposed settlement by and between the PLI Disbursements Trustee and the Asbestos Claimants ranges from $350,000 for mesothelioma (Level VIII) and $95,000 for lung cancer (Level II) to $600 for Level I asbestos-related diseases. As a group, the Asbestosis Claimants are Respondents in the instant proceeding.

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[3] During Petitioner's oral argument before the Second Circuit, the panel expressed concern for the number of deaths that occurred over the years that Petitioner has dragged out the matter. Further, because the Plan provides that the PLI Disbursement Trust "in no event shall [] exist for more than 20 years" (App.81a) – *i.e.*, October 2010 —Petitioner is motivated for further delays.

The Plan of Reorganization

PLI's Bankruptcy and the Plan

Pursuant to an uncontested petition, PLI entered Chapter 11 bankruptcy in November 1986. Following extensive negotiations and multiple drafts, a majority of PLI's creditors approved the Second Amended Joint Plan of Reorganization, as Modified, dated August 17, 1990 [the "Plan"] (App.60a-85a). The Asbestosis Claimants voted to accept the Plan, reversing their vote against an earlier draft, in response to certain amendments incorporated into the Plan as approved. The Bankruptcy Court confirmed the Plan on October 4 , 1990 (App.127a).

PLI Disbursement Trust

The Plan and the accompanying PLI Disbursement Trust Agreement created the PLI Disbursement Trust to handle the payment of various insured claims so as to "secure the insurance rights of PLI" and take steps "reasonably intended to obtain the benefits of insurance . . ." (App.72a). As expressed in Section 4.05.07(a)(ii) of the Plan: "To the extent possible, the provisions of this Plan are designed to preserve insurance rights. . ." (App.74a), and provides that "the Bankruptcy Court shall have continuing jurisdiction over all aspects of the efforts to preserve insurance rights for the benefit of holders of Allowed Insured Claims" (App.75a). *See also,* Section 4.05.07(a)(v) (A.77a-78a). The corresponding Trust Agreement authorizes the Trustee to make distributions to holders of Allowed Claims and "pursue

rights with respect to Insured Claims as provided in Section 4.05.07(a) of the Plan" (Cir.Ct.-J.A.546; *see also,* at 555).

Many claims against PLI have long since been adjudicated or otherwise settled. The majority of the outstanding Class 5C claims are those of the Asbestosis Claimants. Also in that class are approximately $1,610,000 for outstanding allowed cargo damage claims and $1,120,000 for other personal injury claims (Cir.Ct.-J.A.32; *see also*, Plan §2.07 at App.68a).

The Liman Fund

To satisfy the pay-first requirements, Section 4.05.07(a)(i) of the Plan created a "Liman Fund" of $300,000 from which the Trustee can begin paying claims and then obtain reimbursement from the Club, so that the next claim can be paid and reimbursed from the Club "on a sustaining basis":

> In order to fund the payment of Allowed Insured Claims . . . the PLI Disbursement Trust shall set aside and place in reserve $300,000 . . . Such Liman Funds shall be used solely to fund payments of Allowed Insured Claims . . . Upon repayment and/or reimbursement of the full amount of an Allowed Insured Claim paid by the PLI Disbursement Trust using Liman Funds, the funds repaid and/or reimbursed shall be added back to the Liman Funds such that the $300,000 is available as needed on a sustaining basis for use in funding the payment of Allowed Insured Claims.

(App.74a). The intent to utilize the Liman Fund to support the sequential payment of claims and obtain reimbursement from the Club is clearly stated:

> The PLI Disbursement Trustee may . . . take other steps as specified herein reasonably intended to obtain the benefits of insurance. . . . In particular, to the extent necessary in order to obtain payment by a Club or other insurer of Excess Claims,[4] . . . the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the PLI Disbursement Trust in cash for the full amount of the Excess Claim . . .; and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim.

(App.72a-73a).

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[4] The Plan defines "Excess Claim to mean that portion . . . of an Allowed Insured Claim that exceeds the Deductible Claim." (App.64a). "Deductible Claim" refers to the applicable insurance deductible (App.63a-64a). An "Allowed Insured Claim" is the subject of the full Liman provision that is here under discussion. §4.05.07(a) (App.71a-78a).

Petitioner's Set-Off Right and the Plan's Pro Rata Provision

At the time the Plan was written (1990 and before), it was anticipated that the total amount of Petitioner's claimed offsets would exceed the amount of any single insured claim. Therefore, to assure PLI's rights of indemnity, Section 4.05.07(a)(iv) was written to provide that the total offsets would be shared on a pro rata basis among all Class 5C Claimants:

> To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably . . . (a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share. (App.77a-78a).[5]

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[5] The Plan defines *pro rata* "with respect to a Creditor in Class . . . 5C . . . and with respect to a particular distribution under the Plan, in the same proportion that the Allowed Claim held by such creditor bears to the aggregate of all Allowed Claims of all Creditors in such class. . ." (App.67a).

The official Disclosure Statement further explains the set-off procedure:

> [T]he modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI . . . and to the extent possible, each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. The American Club has to date not agreed to such a procedure.

(App.119a).

As described in the 1992 decision in *Prudential I*, Petitioner filed a proof of claim for unpaid premiums and assessments for four of the 41 policies: 1979, 1983, 1984 and 1985, which total amount was stipulated at $1,270,980 (App.166a).

Relevant Procedural Background

The Second Circuit's 1998 Decision – Prudential IV

After the Plan was confirmed, the Trustee commenced a declaratory action to enforce the Plan provisions relating to the 5C Claimants (of which the Asbestos Claimants are the largest component) and the

Petitioner's insurance policies. *See, Prudential I* (App.124a), which wound its way to the Second Circuit in *Prudential IV* (App.242a). Although the Second Circuit rejected a so-called "recycling arrangement" that was proposed by the Trustee and Asbestos Claimants as a way of streamlining and expediting the Trustee's payment and Petitioner's reimbursement of claims,[6] the court expressly noted that:

> At oral argument, the parties agreed that there are other available mechanisms (albeit less efficient) for triggering American Club's indemnification obligations. The Claimants suggested specifically that the $300,000 set aside to fund the recycling could be used to settle individual claims. American Club did not contest the availability of those funds for this purpose, and we do not read the reorganization plan to preclude such use. . .

(App.254a). The Court thus went on to decide other issues regarding the application of policy periods, deductibles and assessments applicable to each claim (App. 267a- 296a).

The Second Circuit Opinion at Issue

Following *Prudential IV*, the matter once again came before the Bankruptcy Court whereby an order was

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[6] Under the hybrid arrangement, the payment to each claimant would have been represented by a bookkeeping entry, with a corresponding entry for the claimant lending the money back to the Trust in the form of a non-recourse loan (App.248a-249a).

sought declaring that the Trustee is authorized under Plan §4.05.07(a)(iv) to apply the Club's set-off ratably among all holders of Allowed Claims and has received the "adequate assurances and documentation" required by Plan §4.05.07(a)(i) (3rd para.). The Bankruptcy Court denied the motion by order dated January 19, 2005 (App.24a) and the District Court affirmed (App.32a). In the Opinion dated June 19, 2008, the Second Circuit reversed and remanded (App.1a, *see also*, 58a). By Order dated September 2, 2008, the Second Circuit denied Petitioner's motion for a panel rehearing and, alternatively, a hearing *en banc* (App.56a).

REASONS FOR DENYING THE PETITION

I. PETITIONER DOES NOT RAISE ANY COMPELLING ISSUES WARRANTING THE GRANT OF *CERTIORARI*

Petitioner does not meet its burden of demonstrating any compelling reason why its Petition should be granted. The Second Circuit Opinion does not raise any issues concerning the public interest or otherwise warranting the Court's attention. Rather, Petitioner's contentions are of interest solely to the parties to this dispute, and are *sui generis* to the interpretation and enforcement of several phrases contained in one particular 19-year old Bankruptcy Plan. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955), in dismissing a *writ of certiorari*, the Court explained, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that

of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," quoting, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Further, there is no argument that the Second Circuit Opinion is in conflict with any decision of the Court or another Court of Appeals, decides an important federal question or has departed from any accepted and usual course of judicial proceedings. *See*, Court Rule 10(a). In fact, as Petitioner's concede and the prior binding decisions demonstrate, the sole issue raised in the Petition — involving claimed setoffs for unpaid insurance premiums for only four of the 41 years of insurance at issue — is controlled by state law (Pet.13 & 17; *see*, *Prudential I*, App.125a-127a, 143a-149a, 152a-165a, 169a-171a; *Prudential II*, App.201a-203a, 212a, 215a, 219a; *Prudential IV*, App.255a-305a). Hence, there is no federal question; nor, for that matter, much else of an issue.

At most, Petitioner's argument seeks to foster the same contrived and implausible interpretation of a select, express provision of the Plan, which argument the Second Circuit held to be "frivolous" (A.23a).[7]

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[7] We also note that the Petition does not involve a final judgment. *See*, *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied"); *Virginia*

(Cont'd)

II. PETITIONER'S ARGUMENT IS MISLEADING AS IT MISSTATES AND OMITS CRITICAL FACTS

In an egregious misrepresentation of the facts, Petitioner misstates and omits critical facts regarding this dispute and the prior binding holdings, going as far back as 1992. Those holdings — and especially those pertaining to the fact that there is no claim of unpaid premiums or assessments for 37 of the 41 policy years, and that due to lengthy periods of the claimants' asbestos exposure, the PLI Trustee can seek coverage under any of the fully paid policies — undermine, if not totally dispose of Petitioner's premium offset claim.

A. There is No Claim of Set-Off for 37 of 41 Years of Insurance Coverage

Petitioner's statement that its "setoff was stipulated to be $1,270,980" in the 1992 Bankruptcy Court decision (*Prudential I*) (Pet.7; App.176a) and that that amount "far exceeds the Trust's present Available Cash" (Pet.7) is misleading. In fact, based on that 1992 decision, the Second Circuit Opinion points out that *the claimed setoff for unpaid premiums relates to* ***only four of the 41*** *years of insurance coverage at issue* (*i.e.*, 1979, 1983, 1984 and 1984; A.15a). For the other 37 years, the premiums were fully paid and thus there is no right of setoff (App.14a-15a). Previously, in the 1992 *Prudential I*

(Cont'd)

Military Institute v. U.S., 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction").

decision, the Bankruptcy Court held that each year's policy was separate and distinct, including premiums, assessments, setoffs and deductibles:

> The insurance policies American Club [Petitioner] issued to PLI were separate and distinct contracts. No policy language conditions indemnification on the payment of premiums and assessments due under different policies. Each policy contained its own period of coverage, deductible, and policy limit.

(App.172a-173a). The Bankruptcy Court thus found that "[e]xcept for the four policies for which premiums were not paid, PLI satisfied all terms and conditions contained in the agreements" (App.167a).[8] Further, since the period of the claimants' asbestos exposure typically occurred over a number of years, the 1992 Bankruptcy Court also held that:

> Trustee is therefore free to choose among the paid policies for ultimate indemnification of asbestos claims according to his determination of which policies benefit the estate. Trustee need not assume the unpaid policies to receive the benefits owing from triggered P&I policies.

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[8] The Bankruptcy Court held that other than 1979, 1983, 1984 and 1985, "[i]n all other years in which PLI was a participant in American Club [Petitioner], PLI paid all premiums and assessments" (App.129a).

(App.173a). In the 1998 *Prudential IV* Opinion, the Second Circuit agreed that the Trustee could choose any year for coverage and that only one single deductible would apply (App.294a, 296a). Also, in adopting the foregoing holdings, the 2008 Second Circuit Opinion observed that that "aspect of the bankruptcy court's decision was not appealed" and thus established the *law of the case* (App.21a).

Accordingly, while the 1992 Bankruptcy Court decision allowed for the setoffs to be applied to all claims (App.173a), the Second Circuit rightly held that Petitioner could not parlay four unpaid policy years as a defense against the other 37 fully paid years:

> It seems most reasonable to interpret the ambiguous (or incomplete) provision of the setoff order as intending, consistent with the Bankruptcy Plan, to allow the setoff of the Unpaid Premiums against all policy years prorated among all Claimants, and *not to interpret it as an absolution, parlaying the Insurer's immunity as to four unpaid policy years into an immunity also covering thirty-seven fully paid years.*

(App.17a; emphasis added).

B. Even for the Four Years at Issue, Petitioner Failed to Cancel Those Policies

In *Prudential I*, the Bankruptcy Court also found that for the four unpaid policy years, Petitioner never exercised its purported contractual right to cancel

coverage. The court concluded: "We therefore must assume, under summary judgment standards, that the 1979, 1983, 1984 and 1985 policies may be revived by payment of the past due premiums and assessments . . ." (App.172a).

III. THE SECOND CIRCUIT OPINION PROPERLY CONSTRUES THE PLAN PROVISION AT ISSUE

The thrust of the issues raised in the Petition involves no more than Petitioner's fanciful but disingenuous arguments over the reading and construction of the Plan's setoff provision. In addition to distorting and twisting the Plan's language, Petitioner omits discussion of other key language in the Plan and its Disclosure Statement.

There can be no dispute that the Plan expressly intends that the total amount of the Club's offsets be divided among all allowed Class 5C claims on a pro rata basis. Section 4.05.07(a)(iv) of the Plan states:

> To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI. . .and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably. . .(a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such

> affected Allowed Insured Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share.

(App.77a-78a). The operative words and intent are clear: "To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably. . ." (*id.*)

The meaning of that provision is underscored by the Supplemental Disclosure Statement Accompanying the Second Amended Joint Plan ["Disclosure Statement"], which is not mentioned in the Petition:

> the Modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI. . .each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. *The American Club has to date not agreed to such a procedure.*

(App.119a; emphasis added). In unsuccessfully opposing that provision, Petitioner well understood the import

and meaning. Nevertheless, as Petitioner concedes (Pet.8), once the Plan was confirmed (on August 17, 1990) and no appeal taken, it was bound to the Plan. *See*, 11 U.S.C. §1327; *In re Murphy*, 346 B.R. 79, 82 (Bktrcy Ct., S.D.N.Y. 2006).

Like a contract — *In re Prudential, supra*, 158 F.3rd at 77; *In re Bartleson*, 253 B.R. 75, 78-79 (9th Cir. BAP, 2000); *C.F. Brookside, Ltd. v. Skyview Memorial Lawn Cemetery*, 175 B.R. 324, 329 (9th Cir. BAP 1994); *see also, In re Stratford of Texas, Inc.*, 635 F.2d 365, 368 (5th Cir. 1981) — the Plan "should be construed so as to give force and effect to all of its provisions. . ." *Painewebber Inc. v. Bybyk*, 81 F.3rd 1193, 1199 (2nd Cir. 1996). *See also, National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759, 762-763 (2nd Cir. 1964); *Weiss v. Weiss*, 52 N.Y.2d 170, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377 (1981); *Trump-Equitable Fifth Avenue Co. v. H.R.H. Construction*, 106 A.D.2d 242, 244, 483 N.Y.S.2d 65, 67 (1st Dept. 1985). *See also*, Pet.20-21. Petitioner's arguments, on the other hand, would nullify the purpose and meaning of the pro rata provision.

Petitioner resorts to a baffling argument regarding the provision's language and use of so-called qualifiers (Pet.23-24). There is nothing remarkable or mysterious about those terms. For example, the phrase: ***"to the extent possible***, each holder of an affected Allowed Insured Claim shall share ratably [the Petitioner's offsets]. . ." (App.77a-78a; emphasis added) simply means that to achieve a pro rating of offsets (which total $1,270,980), the total amount of Allowed Insured Claims needs to equal or exceed that amount. Otherwise, if the total of Allowed Insured Claims is less than the total

offsets, it would not be "possible" to satisfy the higher offset amount. As it turned out, not only do the total asbestos claims (which the Second Circuit recognizes "might amount to tens of millions of dollars" App.4a) greatly exceed the Club's total offsets, but the non-asbestos claims alone (*i.e.*, other personal injury claims amount to $1,120,000 and cargo claims $1,610,000) exceed it as well (Cir.Ct.-J.A.32).[9]

The second qualifier found in the phrase "a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, ***to the extent recovered***, cash from the insurer or Club equal to such holder's ratable share" (App.78a; emphasis added) deals with the possibility that PLI has other or "remaining insurance" that may pay for some of the claimants' losses. In that event, the language provides that the claimants are entitled to be paid from the "distribution" of that other insurance "an amount equal to such holder's ratable share" . . . "***to the extent recovered***." That qualifier kicks-in if the remaining insurance distribution amounts to less than the claimant's ratable share. As it turns out, there is no other insurance. *Petitioner is it!*

IV. THERE IS NO CONFLICT WITH 11 U.S.C. §553

Although not previously argued in the Second Circuit, Petitioner now attempts to conjure up a federal argument, such as by citing to 11 U.S.C. §553 (Pet.2,

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[9] Petitioner's suggestion that it merely has a "theoretical liability" (Pet.7) is preposterous.

15-19). Nevertheless, there is no issue, nor inconsistency between the Second Circuit Opinion and that statute.

Section 553 and the several cases cited by Petitioner —*e.g.*, *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995); *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913) and *Matter of Liquidation of Midland Insurance Co.*, 79 N.Y.2d 253, 590 N.E.2d 1186, 582 N.Y.S.2d 58 (1992)—simply stand for the proposition that a creditor owing a debt to the bankrupt is entitled to a dollar-for-dollar offset for a mutual debt owed by the bankrupt. Here, the Plan does exactly that. It provides that the Club will receive a full offset for the unpaid premiums. That the Plan provides for the offset being shared ratably among the 5C Claimants is not inconsistent with Section 553. By its new fangled argument, however, Petitioner is seeking to go way beyond Section 553, and use it as a shield to prevent itself from having to pay the PLI Trust insurance benefits that will greatly exceed the total offset amount. That is not what the statute says.

To illustrate, we here set forth two possible scenarios. In scenario 1, let's assume that the total liability for all claims is a mere $1,000,000. In such case, since the total offset ($1,270,980) exceeds that amount, Petitioner will pay nothing. However, in a more likely scenario, let's assume that the total for all claims adds up to $20,000,000. In that case, Petitioner's total liability will be reduced by the offset amount, so that its total liability (before subtracting deductibles) is $18,729,020. That the offset is apportioned ratably among the various 5C Claimants is of no consequence to the result.

Whatever the case, however, as the Second Circuit reasoned, Petitioner's attempt to parlay its relatively small offset for unpaid premiums based on only four yearly policies as a shield against any liability for a total of 41 years (of which 37 have been fully paid) is illogical and unsupported by any legal authority.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Petition be denied.

Respectfully submitted,

SANFORD F. YOUNG
Counsel of Record
LAW OFFICES OF SANFORD F. YOUNG, P.C.
225 Broadway
New York, New York 10007
(212) 227-9755

ALAN KELLMAN
THE MARITIME ASBESTOSIS LEGAL CLINIC,
A DIVISION OF THE JAQUES ADMIRALTY
LAW FIRM, P.C.
645 Griswold, Suite 1570
Detroit, Michigan 48226-4116

Attorneys for Respondents
Asbestosis Claimants